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## KENT'S INTRODUCTORY LECTURE.<sup>1</sup>

In entering upon a course of lectures on the Government and Laws of our Country, I cannot refrain from expressing what I have long felt, a deep sense of the greatness of the undertaking, and a just diffidence of my own qualifications to execute it with success. This is the first instance in the annals of this seat of learning, that the science of our municipal laws has thus been admitted into friendship with her sister arts, and been invited to lend her aid to complete a course of public education. The experiment is however well deserving of a favorable reception; and none I am persuaded will be more ready to bestow it, than those gentlemen who are the most truly sensible of the importance and difficulty of the inquiries which this experiment involves. No persons will more cheerfully regard this attempt with the indulgence it will greatly need, than those who have been accustomed to liberal pursuits, and have taken a comprehensive survey of the natural foundation of laws, and the complicated system of our national jurisprudence.

Institutions of the present kind seem to be peculiarly proper at this day, when the general attention of mankind is strongly engaged in speculations on the principles of public policy. The human mind, which had been so long degraded by the fetters of feudal and papal tyranny, has begun to free herself from bondage, and has roused into uncommon energy and boldness. The theory of government, and the elements of law, have been examined with a liberal spirit, and the profoundest discernment. Nor have our American Constitutions been neglected abroad; they have excited scrutiny, and merited and received applause. A learned French professor<sup>2</sup> has incorporated them, although in a very imperfect manner, into his plan of

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<sup>1</sup> An Introductory Lecture to a Course of Law Lectures. Delivered November 17, 1794. By James Kent, Esquire, Professor of Law in Columbia College. Published at the request of the Trustees. New York. Printed by Francis Childs. 1794.

<sup>3</sup> De la Croix's Review of Constitutions, Vol. 2, 419.

Juridical Lectures; and he even expressed a concern, lest the picture he drew of the purity of our legislation should promote emigrations from Europe. How inexcusable should we probably be deemed by mankind, if we neglected to make our own laws and constitutions an interesting object of public instruction?

But the people of this country are under singular obligations, from the nature of their government, to place the study of the law at least on a level with the pursuits of classical learning. The art of maintaining social order, and promoting social prosperity, is not with us a mystery fit only for those who may be distinguished by the adventitious advantages of birth or fortune. The science of civil government has been here stripped of its delusive refinements, and restored to the plain principles of reason. Every office in the vast chain of political subordination, is rendered accessible to every man who has talents and virtue to recommend him to the notice of his country. There is no individual in any station, art, or occupation, who may not entertain a reasonable expectation in some period of his life, and in some capacity, to be summoned into public employment. If it be his lot however to be confined to private life, he still retains the equal and unalienable rights of a citizen, and is deeply interested in the knowledge of his social duties; and especially in the great duty of wisely selecting and attentively observing those who may be entrusted with the guardianship of his rights, and the business of the nation. But those who are favored with nobler and superior parts, with a brighter portion of moral and intellectual accomplishments, (and such I hope will from time to time be the ornaments and pride of this seat of learning) have a still louder invitation to a knowledge of the law, and stronger obligations to obtain it. Such persons are reared up by Providence, not to slumber away their lives in the obscurity of retreat, but to be useful, eminent, and illustrious in public stations. Their usefulness will not be confined merely to the exercise of the inferior offices of the local districts in which they may live, although in such offices a competent share of legal information is required. A wider field is opened for the virtuous and generous youth of our universities. The free Commonwealth of the United

States, which in all its ties, relations and dependencies, is animated with the pure spirit of popular representation, offers the highest rewards to a successful cultivation of the law, and the utmost encouragement to genius. The numerous seats in our State Legislatures, in Congress, in the higher Judicial and Executive Departments, ought in general to be filled with a succession of men, who to the indispensable virtues of probity and patriotism, unite a masterly acquaintance with the leading principles of our Constitutional Polity, and the maxims and general detail of our municipal institutions. A moment's reflection must surely convince every one what an amazing trust is confided to those who are placed in the administration of our government, and what extensive legal and political knowledge is requisite to render them competent to discharge it. Our political fabrics and systems of jurisprudence, which have been reared with great pains, and perfected with much wisdom, are to be guarded and preserved not only from the open assaults of violence, but the insidious operations of faction, which are more hostile and dangerous to the principles of liberty.

A general initiation into the elementary learning of our law, has a happy tendency to guard against mischief, and at the same time to promote a keen sense of right, and a warm love of freedom. This is strikingly illustrated in the historical progress of our colony governments, and manners. It is well known that the influence of the Common Law was strongly felt and widely diffused by our American ancestors, from the time of their emigration from Europe, and settlement on this side of the Atlantic. The history of their colonial proceedings, (an inquiry too much neglected at the present day) discovers clearly the marks of a wise and resolute people, who understood the best securities of political happiness, and the true foundation of the social ties. The earliest inhabitants of the present State of Massachusetts declared by law that the free enjoyment of the liberties of humanity was due to every man in his place and proportion, and ever had been, and ever would be, the tranquility and stability of the Commonwealth. They also avowed that they came over with the privileges of freemen, and they ascertained and defined those privileges, and estab-

lished a Charter of Rights, with a caution, sagacity, and precision, rarely, if at all, surpassed by their descendants.<sup>1</sup> In the distant history of this State, we meet with traces of the same enlightened sense of civil security. Early in the present century, our Colonial Assembly declared, that it was, and always had been, the unquestionable right of every freeman to have a perfect and entire property in his goods and estate; and that no money could be imposed or levied upon him without the consent of his representatives.<sup>2</sup> Testimonies of the same flattering nature are probably to be found in the records of all our Colony Legislatures. But no higher evidence need or can be produced of the prevailing knowledge of our rights, and the energy of the freedom of the Common Law, than the spirit which pervaded and roused every part of this Continent on the eve of the late Revolution; when the same power which had once nourished us, jealous of our rising greatness, attempted to abridge our immunities, and check our prosperity. The first Congress, which assembled in the year 1774, discovered a familiar acquaintance with the sound principles of government, and just notions of the social rights of mankind. They declared and asserted these rights with a perspicuity, force, manliness and firmness, which threw luster on the American character. The late Earl of Chatham said he could discover no nation or council that surpassed them, notwithstanding he had read Thucydides, and had studied and admired the master-states of antiquity.

By thus comparing the excellent principles of our civil policy, with their effects upon the progress of our government, and the spirit of our people, we are insensibly and properly led to feel for them an uncommon share of reverence and attachment. I cannot but be of opinion, that the rudiments of a law, and senatorial education in this country, ought accordingly to be drawn from our own history and constitutions. We shall by this means imbibe the principles of republican government from pure fountains; and prevent any improper impressions being received from the artificial distinctions, the oppressive establishments, or the wild innovations which at present distinguish the Trans-Atlantic World.

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<sup>1</sup> Hazard's State Papers, 408, 487.

<sup>2</sup> Colony Journals, vol. I, 224.

The British Constitution and Code of Laws, to the knowledge of which our lawyers are so early and deeply introduced by the prevailing course of their professional inquiries, abounds, it is true, with invaluable principles of equity, of policy, and of social order; principles which cannot be too generally known, studied and received. It must however be observed at the same time, that many of the fundamental doctrines of their government, and axioms of their jurisprudence, are utterly subversive of an equality of rights; and totally incompatible with the liberal spirit of our American establishments. The student of our laws should be carefully taught to distinguish between the principles of the one government, and the genius which presides in the other. He ought to have a correct acquaintance with genuine republican maxims, and be thereby induced to cultivate a superior regard for our own, and I trust more perfect systems of liberty and justice. In the words of a discerning writer in this country, who has very ably unfolded the doctrine of representative republics, "The student should be led through a system of laws applicable to our governments, and a train of reasoning congenial to their principles."<sup>1</sup>

But there is one consideration, which places in a strong point of view, the importance of a knowledge of our constitutional principles, as a part of the education of an American lawyer; and this arises from the uncommon efficacy of our courts of justice, in being authorized to bring the validity of a law to the test of the Constitution. As this is however a subject of a very interesting tendency, and has in many cases inspired doubts and difficulties,<sup>2</sup> I will take the liberty of devoting a few reflections to it, even in this introductory discourse.

The doctrine I have suggested, is peculiar to the United States. In the European World, no idea has ever been entertained (or at least until lately) of placing constitutional limits to the exercise of the legislative power. In England, where the Constitution has separated and designated the departments of government with precision and notoriety, the Parliament is still considered as transcend-

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<sup>1</sup> Chipman's Sketches, 238.

<sup>2</sup> See the case, *Trevett and Weeden*, in Rhode-Island, 1786.

ently absolute; and, although some judges have had the freedom to observe, that a statute made against natural equity was void,<sup>1</sup> yet it is generally laid down as a necessary principle in their law, that no Act of Parliament can be questioned or disputed.<sup>2</sup> But in this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary legislature, and this precaution is considered in general as essential to perfect security, and to guard against the occasional violence and momentary triumphs of party. Without some express provisions of this kind clearly settled in the original compact, and constantly protected by the firmness and moderation of the judicial department, the equal rights of a minor faction, would perhaps very often be disregarded in the animated competitions for power, and fall a sacrifice to the passions of a fierce and vindictive majority.

No question can be made with us, but that the acts of the legislative body, contrary to the true intent and meaning of the Constitution, ought to be absolutely null and void. The only inquiry which can arise in the subject is, whether the legislature is not of itself the competent judge of its own constitutional limits, and its acts of course to be presumed always conformable to the commission under which it proceeds; or whether the business of determining in this instance, is not rather the fit and exclusive province of the courts of justice. It is easy to see, that if the legislature was left the ultimate judge of the nature and extent of the barriers which have been placed against the abuses of its discretion, the efficacy of the check would be totally lost. The legislature would be inclined to narrow or explain away the Constitution from the force of the same propensities or considerations of temporary expediency, which would lead it to over-turn private rights. Its will would be the supreme law, as much with, as without these constitutional safeguards. Nor is it probable, that the force of public opinion, the only restraint that could in that case exist, would be felt, or if felt, would be greatly regarded.

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<sup>1</sup> Hob. 87; 12 Mod. 687.

<sup>2</sup> Wooddeson's Elm. 81. 4 Inst. 36. Mr. Paley in his "Principles of Moral and Political Philosophy" says the Legislature must of necessity be absolute.

If public opinion was in every case to be presumed correct and competent to be trusted, it is evident, there would have been no need of original and fundamental limitations. But sad experience has sufficiently taught mankind, that opinion is not an infallible standard of safety. When powerful rivalries prevail in the community, and parties become highly disciplined and hostile, every measure of the major part of the legislature is sure to receive the sanction of that party among their constituents to which they belong. Every step of the minor party, it is equally certain will be approved by their immediate adherents, as well as indiscriminately misrepresented or condemned by the prevailing voice. The courts of justice which are organized with peculiar advantages to exempt them from the baneful influence of faction, and to secure at the same time, a steady, firm and impartial interpretation of the law, are therefore the most proper power in the government to keep the legislature within the limits of its duty, and to maintain the authority of the Constitution.

It is regarded also as an undisputed principle in American politics, that the different departments of government should be kept as far as possible separate and distinct. The legislative body ought not to exercise the powers of the executive and judicial, or either of them, except in certain precise and clearly specified cases. An innovation upon this natural distribution of power, has a tendency to overturn the balance of the government, and to introduce tyranny into the administration. But the interpretation or construction of the Constitution is as much a judicial act and requires the exercise of the same legal discretion, as the interpretation or construction of a law. The courts are indeed bound to regard the Constitution what it truly is, a law of the highest nature, to which every inferior or derivative regulation must conform. It comes from the people themselves in their original character, when defining the permanent conditions of the social alliance. And to contend that the courts must adhere implicitly to the acts of the legislature, without regarding the Constitution, and even when these acts are in opposition to it, is to contend that the power of the agent is greater than that of his principal, and that the will of only one concurrent and co-ordinate depart-



ment of the subordinate authority, ought to control the fundamental laws of the people.

This power in the judicial, of determining the constitutionality of laws, is necessary to preserve the equilibrium of the government, and prevent usurpations of one part upon another; and of all the parts of the government, the legislative body is by far the most impetuous and powerful. A mere designation on paper, of the limits of the several departments, is altogether insufficient, and for this reason in limited constitutions, the executive is armed with a negative, either qualified or complete upon the making of laws. But the judicial power is the weakest of all, and as it is equally necessary to be preserved entire,<sup>1</sup> it ought not in sound theory to be left naked without any constitutional means of defence. This is one reason why the judges in this State are associated with the Governor, to form the Council of Revision, and this association renders some of these observations less applicable to our own particular Constitution, than to any other. The right of expounding the Constitution as well as laws, will however be found in general to be the most fit, if not only effectual weapon, by which the courts of justice are enabled to repel assaults, and to guard against encroachments on their chartered authorities.<sup>2</sup>

Nor can any danger be apprehended, lest this principle should exalt the judicial above the legislature. They are co-ordinate powers, and equally bound by the instrument under which they act, and if the former should at any time be prevailed upon to substitute arbitrary will, to the exercise of a rational judgment, as it is possible it may do even in the ordinary course of judicial proceeding, it is not left like the latter, to the mere control of public opinion. The judges may be brought before the tribunal of the legislature, and tried, condemned, and removed from office.

I consider then the courts of justice, as the proper and intended guardians of our limited constitutions, against the factions and encroachments of the legislative body. This affords an additional and weighty reason, for making a

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<sup>1</sup> Montesq. *Spirit of Laws*, Book xi. Chap. 6.

<sup>2</sup> See the decision of the Circuit Court of the United States, for the District of New-York, April 5th, 1792.

complete knowledge of those constitutions to form the rudiments of a public, and especially of a law education. Nor are the accomplishments of academical learning any ways repugnant to a rapid improvement in the law. On the contrary, the course of instruction which is taught within these walls, will greatly assist the researches of the student into the nature and history of all governments,—will give him a just sense of the force of moral and political obligation, and will especially crown the career of his active life, with increasing honor and success. A lawyer in a free country, should have all the requisites of Quintilian's orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils, establish it by his laws, and correct it by his example. In short, he should resemble Tully, whose fruitful mind, as this distinguished teacher of oratory<sup>1</sup> observes, was not bounded by the walls of the Forum, but by those of nature. Nor do I recollect any material part of the attractive chain of classical studies, but which may be useful as well as ornamental in our legal pursuits.

The perusal of the best Greek and Roman authors, the purest models of composition and correctness, is highly important to those who wish to form their taste and animate their genius. The ancient classic writers, are in general so distinguished for their good sense and manly graces, and have formed their works on such sure principles of nature, that they have always been diligently studied in countries, and by scholars, the most celebrated for learning and accomplishments, and no doubt they will receive the admiration of the most distant ages. But it is not only with a general view to taste and elegance, or even for the glowing exhibition of public examples, that I would thus warmly recommend the original compositions of the ancients. The knowledge of the civil law, the most durable monument of the wisdom of the Romans, is extremely interesting, whether we consider the intrinsic merit of the system, or its influence upon the municipal laws of the land. That venerable body of law, which was compiled under the

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<sup>1</sup> De Institutione Oratoria, Lib. XII.

auspices of the Emperor Justinian, and which has fortunately come down for the delight and improvement of modern times, discovers almost everywhere, the traces of an enlightened age of the Roman Jurisprudence. And it is a well known fact, that although the taste and philosophy of the Romans declined with their freedom, a succession of eminent civilians continued to shine with equal lustre far under the Emperors, and Papinian, Paul, and Ulpian still preserved the sound sense and classic purity of the civil law.

The art of close reasoning, which is greatly helped by the sciences of logic and mathematics, is of indispensable importance to those who wish to possess weight and reputation at the bar. A distinguishing mind is to be sure not an ordinary gift. An accurate acquaintance with the general principles of Universal Law, and an acute discernment of the minute and often latent circumstances which discriminate the operation of causes, and enable the means to be justly applied to the end, are the fruits only of great capacity and consummate application. Such fortunate geniuses are destined like Hardwicke or Mansfield, to enlighten and meliorate the jurisprudence of their own times, and to render their names familiar with future generations. But as an eminent author has observed,<sup>1</sup> legal studies require only a state of peace and refinement, and may even be pursued with a common share of judgment, experience and industry: and it will be found in almost every degree of natural talents, that mathematical and logical exercises, contribute to collect and strengthen the powers of the human mind.

The doctrines of moral philosophy form the foundation of human laws and must be deemed an essential part of juridical education. It is the business of this science to examine the nature and moral character of man, the relations he stands in to the Great Author of his being, and to his fellow men; the duties, the rights and happiness resulting from those relations. We are led by these inquiries to a knowledge of the nature, extent, and fitness of moral obligation, the object and efficacy of punishment, the necessity and final end of government, the justness and harmony of obedience.

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<sup>1</sup>Gibbon's Hist. Vol. 8, 26.

But the art of public speaking is singularly applicable to the profession of the law, which by its bar and senatorial employments, possesses a field, which next to that of the pulpit, is eminently within the region and under the influence of eloquence. The object of public speaking is to illustrate and enforce the truth. To this end, it is necessary to remove prejudices, engage the attention, state the cause with clearness, arrange the arguments with skill, and deliver them with justness of expression and the force of sincerity. "Perhaps there is no scene of public speaking," says an elegant teacher of the science of rhetoric,<sup>1</sup> "where eloquence is more necessary than at the bar. The dryness and subtilty of the subjects, generally agitated in such places, require more than any other a certain kind of eloquence in order to command attention; in order to give proper weight to the arguments that are employed, and to prevent anything which the pleader advances from passing unregarded." And when we recollect the intimate connection that subsists between the pursuits of law and general policy, and the path which is opened in this and in all free countries, from the laborious duties of the bar into the deliberate assemblies of the nation, the student is strongly invited to aim at something higher than the calm and temperate eloquence which is proper in his profession. He should strive to make himself a master of the great variety of public interests, and the springs of public action. He should cultivate a glowing attachment to his country and the best good of mankind, and awaken in his breast those lively passions which give the highest energy to the understanding, and the boldest efforts to eloquence. It was by virtues like these, added to the force of universal education, that the ancient orators, most of whom were lawyers, attained to such distinguished pre-eminence in their age and country. And in like manner the principal ornaments of the English bench and bar, within the period of the present times, have been not more remarkable for their consummate knowledge of the law, than for their talents, oratory and acquisitions as scholars.

But I have ventured perhaps sufficiently far, in endeavoring to point out for the benefit of the student, the

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<sup>1</sup> Blair's *Lec.* Vol. 2. 272.

principal advantages of a knowledge of our government and laws, and the utility of academical learning in aiding his pursuits. It remains only, that I designate the general path I intend to pursue in the course of the following lectures.

This is not the proper place to prescribe a system of rules for the mere mechanical professor of our laws. The design of this institution, is undoubtedly of a more liberal kind. It is intended to explain the principles of our constitutions, the reason and history of our laws, to illustrate them by a comparison with those of other nations, and to point out the relation they bear to the spirit of representative republics. Nothing I apprehend is to be taught here, but what may be usefully known by every gentleman of polite education, but is essential to be known by those whose intentions are to pursue the science of the law as a practical profession.

I propose to begin with an examination of the nature and duties of government in general, and a brief historical review of the several forms of government which have hitherto appeared in the world. The political history of the United States, will then be considered from the earliest dawn of Union to the settlement of the present Constitution. The final establishment of our Independence, will naturally lead us to examine the consequence of our separate situation, by a summary review of the Law of Nations, as applicable to the several conditions of Peace, of War and Neutrality. With these preliminary dissertations, we shall be prepared to enter into a systematic view of the Constitution and Laws of the National Government.

I shall consider the structure, rights, and powers of Congress, the Constitution and Powers of the President, and of the subordinate Executive Departments, with a survey of the several subjects of a fiscal and military nature, which are incident to those departments. The Judicial System will next occupy our attention. This will involve a consideration of the organization, powers and jurisdiction of the Federal Courts, with an historical and critical examination of the elementary parts of a suit at law. The powers and objects of the Admiralty, and Equity side of those Courts will also be the subject of a dis-

tinct inquiry. I shall then conclude the subject of the Federal Government and its Jurisprudence, with a detail of the Criminal Law and the various proceedings in public prosecutions.

The constitutions of the several States, their structure and residuary portion of power, and particularly the Constitution of this State, in all its branches, Legislative, Executive, and Judicial, will be the next and extensive subject of our inquiries. The remainder of this course, will be principally if not entirely confined to the Municipal Laws of this State. This will lead me to examine the rights of property, both real and personal, in all their several gradations and modifications, and the several ways in which property is acquired and transferred. The interesting subject of Personal Contracts, will naturally involve itself in this examination. Our attention will probably be finally directed to the diffusive subject of Private Actions, and of Crimes and Punishments, but with respect to some of these latter subjects I have not as yet been able to make the ultimate arrangements.

This is a sketch of the outlines of the course of lectures which are before me. The anxieties which are felt for the execution, are in some measure proportioned to the impressions which result from the dignity of the subject, and the interesting nature of this institution. The science of law, has expressly for its object the advancement of social happiness and security. It reaches to every tie which is endearing to the affections, and has a concern on every action which takes place in the extensive circles of public and private life. According to the lively expression of Lord Bacon, it may justly be said to *come home to every man's business and bosom*. But there are other considerations which naturally arise in connection with our reflections on the happy system of our constitutions and laws.

The events which are rapidly crowding the present era, are to be deemed among the most solemn, and the most important in their consequences, of any which have hitherto been displayed in the history of mankind. Great revolutions are taking place in the European World, in government, in policy and in morals, and a new turn will be given to the habits of thinking, and probably to the destination of

human society. A total demolition of the ancient fabrics, and the most daring hand of innovation, may possibly be expedient in the eastern continent, to recall society to its original principles of simplicity and freedom; and to dissolve the long, intricate and oppressive chain of subordination, which has degraded the principal nations of Europe, and who have been doomed so severely to suffer in the first instance by the violence of the Roman Power, and afterwards by the genius of the Feudal System. But amidst the universal passion for novelty, which threatens to overturn everything which bears the stamp of time and experience, we in this country ought to be extremely careful, not to pass along unconscious of the labors of the patriots who effected our Revolution; nor let the admirable fabrics of our constitutions, and the all pervading freedom of our Common Law be left unheeded or despised. I am most thoroughly, most deeply persuaded, that we are favored with the best political institutions, *take them for all in all*, of any people that ever were united in the bonds of civil society. The goodness of these institutions will brighten on free investigation, and faithful experiment, and be respected according as they are understood.

To preserve these best fruits of our Independence, is a trust to be confided to the rising hopes of the day, to such of our young gentlemen as are animated with the generous passion of becoming hereafter distinguished as lawyers, magistrates and statesmen; and permit me to add, it is a trust which they ought not to contemplate, but with a reverence due to its importance, and with a manly determination to deserve it. If he to whom is entrusted in this seat of learning the cultivation of our laws, can have any effect in elevating the attention of some of our youth from the narrow and selfish objects of the profession, to the nobler study of the general principles of our governments, and the policy of our laws—if he can in any degree illustrate their reason, their wisdom, and their propitious influence on the freedom, order, and happiness of society, and thereby produce a more general interest in their support, he will deem it a happy consolation for his labors.